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September 5, 2001

BY HAND DELIVERY

Ms. Magalie Roman Salas
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CS Docket No. 01-129 /

Dear Ms. Salas:

Enclosed please find an original and one copy of the Reply Comments of the National Association of Broadcasters.

I would be grateful if you could file-stamp the enclosed extra copy of the comments and return it to our messenger. Thank you for your assistance.

Very truly yours,



Thomas P. Olson

Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Annual Assessment of the Status
Of Competition in Markets for the
Delivery of Video Programming

Broadcast Signal Carriage Issues

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CS Docket No. 01-129

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Henry L. Baumann
Benjamin F.P. Ivins

NATIONAL ASSOCIATION OF
BROADCASTERS
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September 5, 2001

Kelly Williams
Director of Engineering

The National Association of Broadcasters (“NAB”)¹ hereby submits its Reply Comments in response to the Commission’s June 25, 2001 Notice of Inquiry in the above-captioned matter. These reply comments are intended to rebut erroneous claims in Comments filed by satellite interests about the capacity of satellite carriers to retransmit local television stations.

At the outset, we note one matter as to which there is no dispute at all: that Congress’ creation of a compulsory license for local-to-local retransmissions of television stations has given an enormous boost to the satellite industry. *See, e.g.*, Comments of Satellite Broadcasting & Communications Association at 3 (filed Aug. 3, 2001) (discussing “tremendous favorable impact that the Section 122 license contained in SHVIA had on subscriber growth”); Comments of DIRECTV, Inc. at 12-13 (filed Aug. 3, 2001) (“DIRECTV estimates that its overall subscriber levels have increased by 20% as a result of local broadcast channel service”). DIRECTV is already providing local-to-local service in 41 Designated Market Areas, DIRECTV Comments at 2, and EchoStar is offering local-to-local in nearly as many markets.

Despite the concededly “tremendous” benefits that it is enjoying thanks to Congress’ creation of a local-to-local compulsory license, the satellite industry continues to complain that the gift Congress gave it is not big enough. In particular, several satellite commenters contend that satellite carriers are unable to offer local-to-local service in additional markets because of Congress’ decision -- starting in 2002 -- to make the compulsory license available only for carriage of *all* of the stations in a given market, rather than for cherry-picking of just a few. *E.g.*, SBCA Comments at 7; Comments of National Rural Telecommunications Cooperative at 15-16. The satellite industry is simply wrong about this: as the Commission’s own technical expert has

¹ NAB is a nonprofit incorporated association that serves and represents America’s radio and television broadcast stations and networks.

carefully documented in recent court filings, satellite carriers have ample capacity to carry all of the local stations in every market in which they would otherwise wish to provide local-to-local service -- and even to carry all of the eligible stations in all 210 U.S. television markets if they so chose.²

Notably, the satellite carriers' trade association does *not* claim that the carriers would offer local-to-local service in all 210 U.S. television markets were their wish -- for a permanent compulsory license to cherry-pick local stations -- to be granted. Rather, the SBCA says that "DBS industry leaders estimate that *more than 60 DMAs* would receive local to local service" if carriers were granted the unlimited ability to cherry-pick. SBCA Comments at 7 (emphasis added). Since DIRECTV is already serving 41 markets, the SBCA's contention is that only about 20 markets -- not 170 markets -- are missing out on local-to-local service as a result of the SHVIA's carriage provisions. But even that limited claim is wrong: through sensible use of their spectrum and of off-the-shelf technology, DIRECTV and EchoStar could easily serve the 60 markets that SBCA says the carriers would like to serve. Indeed, DIRECTV and EchoStar could readily retransmit all eligible stations in all 210 markets if they wished to do so.

As set forth in the Commission's own filings in currently pending SHVIA litigation, there are several techniques available to carriers to greatly increase their carriage of large numbers of local stations, including the following:

² As the Commission (and the other federal defendants) explained, satellite carriers "are plainly wrong insofar as they alleged that SHVIA operates 'to prevent satellite carriers from extending local television programming over satellite systems to all but the largest media markets in the United States.'" Memorandum in Support of Federal Defendants' Motion for Summary Judgment, *SBCA v. FCC*, Civ. No. 00-1571-A (filed May 25, 2001). NAB is filing a redacted copy of this Memorandum as Attachment A to these Reply Comments.

Spot beams. Up to now, the carriers have used enormously wide “CONUS” (Contiguous United States) beams to retransmit local programming. Using a CONUS beam for that purpose means that -- for example -- the local stations in Cleveland are retransmitted to the dishes of all of DIRECTV’s carriers’ customers nationwide, but are then blacked out for everyone outside of Cleveland. Both DIRECTV and EchoStar have recognized that, with rare exceptions, CONUS beams are a foolish choice for delivering local channels, and that the efficient way to do so is through use of spot beam satellites, which reuse the same frequency to deliver different programming (*e.g.*, different local channels) in different parts of the country.³ EchoStar and DIRECTV have each announced plans to launch two satellites fitted with spot beams to enhance their ability to offer local-to-local service. These satellites will enable DIRECTV and EchoStar to deliver far more local stations than could be retransmitted with CONUS satellites – and prove Congress’ wisdom in creating incentives for carriers to exploit technological advances to expand their ability to deliver local stations.

Dishes capable of receiving signals from two or three orbital locations. In addition to use of spot beams, many other techniques are available to enable carriers to deliver large numbers of local stations. For example, although satellite dishes have traditionally been “pointed” at only a single orbital location, both DIRECTV and EchoStar today offer dishes that can receive signals from two or even three different orbital locations (101° W.L, 110° W.L, and 119° W.L). *E.g.*, DIRECTV Web Site, <http://www.DIRECTV.com/about/abouttablepages/>

³ All of this is documented in the Commission’s court filings in *SBCA v. FCC*, Civ. No. 00-1571-A (E.D. Va.). In addition to the Memorandum of Law cited in note 2 above, we attach to this pleading a copy of the Federal Defendants’ Statement of Material Facts as to Which There is No Genuine Issue (filed May 25, 2001) (Attachment B hereto) and of the expert Declarations of Roger Rusch and Jeffrey Rohlfis filed by the Federal Defendants (Attachments C and D respectively). All of these documents have been redacted to eliminate any confidential material.

0,1271,77,00.html (visited Sept. 5, 2001) (“The DIRECTV Multi-Satellite dish . . . is an 18x24-inch oval dish that's specially designed to receive signals from all of our current satellite locations.”). Simply through use of dishes that point to multiple satellites, consumers can receive far more programming than with the single-satellite dishes that were the only option until very recently.

Compression and modulation. Other powerful methods of increasing satellite capacity include digital compression, statistical multiplexing, efficient modulation, error correction coding, and noise reduction, which enable carriers to squeeze many TV channels onto a single frequency. Recent technical advances in these areas have enabled carriers to deliver far more channels than before, and those advances will continue. As of the fall of 2000, DIRECTV was already able to deliver 11 channels per frequency,⁴ and that figure is soon to increase still further: DIRECTV announced in May 2001 that its compression technology vendor, Harmonic Inc., was providing an improved compression package that “will enable DIRECTV to substantially expand its offering of local broadcast channels.”⁵

Another method of increasing satellite capacity – converting from “QPSK” modulation to “8PSK” modulation – is also available to satellite carriers. This change alone could result in an increase in capacity of 30% or more. And while consumers wishing to receive signals transmitted in 8PSK would need a new set-top box, the new boxes could be phased in gradually for most consumers as they upgrade to new boxes with new features (such as digital video

⁴ Declaration of Jeffrey H. Rohlfs, ¶ 14, *SBCA v. FCC*, Civ. No. 00-1571-A (quoting Declaration of DIRECTV executive) (redacted copy filed herewith).

⁵ Press Release, *DIRECTV Signs Contract for Harmonic's Digital Compression Systems - DIRECTV To Deploy Hundreds of Harmonic MV50 Encoders by Year's End*, www.divi.com/pr_detail.fcfm?pr_id=213&highlight=15 (issued May 7, 2001).

recorders or high definition capability). *See* Declaration of Roger J. Rusch, ¶ 37, *SBCA v. FCC* (filed May 23, 2001) (redacted copy filed herewith).

Additional satellite locations and additional spectrum bands. The techniques just described are all available to DIRECTV and EchoStar for use with Ku-band transmissions at their “full-CONUS” satellite locations, namely 101° W.L., 110° W.L., and 119° W.L. But there is also a wealth of Ku-band satellite capacity at nearby “wing slots” (over the Atlantic or Pacific) that are capable of serving large portions of the United States – and would be ideal for local-to-local retransmissions, which need not reach the entire country. (Indeed, EchoStar itself has used its wing slots for delivery of local channels.)

In addition, as DBS firms such as Local TV on Satellite, Inc. (“LTVS”) and Pegasus Communications have recognized, the Ka-band spectrum offers tremendous opportunities for delivery of local channels. LTVS, for example, has shown that, using only two Ka-band satellites, a satellite carrier could deliver not just standard-definition signals but a full 19.4 Mbps digital signal in 65 markets, or some 25 more markets than either DIRECTV or EchoStar serves today. *See* LTVS web page, www.localtv-satellite.com. Using the new Ka-band capacity awarded by the Commission in August 2001 in the second-round Ka-band proceeding, Pegasus Development Corporation and DIRECTV corporate affiliate Hughes Communications, Inc. will have still more opportunities for delivering local television stations. (These second-round authorizations are on top of the slots already allocated to DIRECTV and EchoStar (or their affiliates) in the first round.) As the Commission observed in approving the second-round licenses, “[t]hese advanced [Ka-band] satellite systems will enhance competition among service providers in the marketplace and provide new service options to the American public.” News Release, *FCC International Bureau Authorizes Second-Round Ka-Band Satellite Systems* (Aug.

2, 2001). Celebrating the Commission's second-round award, one of the new Ka-band licensees, Pegasus announced that the new licenses will enable it to provide a variety of services, including "*re-transmission of local broadcast signals . . . to communities throughout North America.*" Pegasus web site, www.pgtv.com (visited Aug. 13, 2001) (emphasis added).

Pooling capacity. In addition to all of the other techniques just discussed, the DBS firms could double their capacity to carry local stations using Ku-band frequencies by creating a local-to-local cooperative (either through LTVS or otherwise) that would deliver local stations to both EchoStar and DIRECTV subscribers, rather than having EchoStar and DIRECTV wastefully duplicate the uplinking and downlinking of the identical signals. In support of its recent \$32 billion offer for DIRECTV's corporate parent, EchoStar said that avoidance of the wasteful duplication of satellite transmissions is a key part of the "vast synergies" that could be created by combining the two companies, specifically mentioning improved opportunity to offer local-to-local service. See EchoStar Press Release, www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=197811 (released Aug. 5, 2001). Those same synergies could, of course, be achieved through a cooperative venture between the two companies, rather than by merger. DIRECTV's president has publicly confirmed that sharing spectrum for delivering local stations is "certainly possible." www.tvinsite.com (visited Aug. 6, 2001).

The power of these techniques. As the Commission's own outside satellite capacity expert explained in a declaration filed in federal court, use of just a few of the techniques described above would enable a satellite carrier, using "technology that is currently available and already in use on other satellites," to retransmit *all* of the eligible television stations in *every market in the United States*, using as few as 12 frequencies – out of the 46 full-CONUS

frequencies available to DIRECTV or the 50 full-CONUS frequencies available to EchoStar. Rusch Decl., ¶ 19. And this assessment by the Commission's own expert witness does not take into account the enormous potential of non-CONUS "wing slots," of non-Ku-band frequencies such as Ka-band, or of a local station transmission cooperative; rather, it assumes that DIRECTV and EchoStar each continue to rely solely (and separately) on their full-CONUS Ku-band slots, as they do today.

Since carriers could deliver all of the television channels in the United States with as few as 12 frequencies, they could obviously – if they wished to do so – easily retransmit the much smaller number of stations in the top 60 markets, which is all that SBCA says the DBS firms currently want to do in any event. The satellite industry's claim that the SHVIA is preventing them from expanding to additional local markets is thus palpably incorrect.

Respectfully submitted,

NATIONAL ASSOCIATION OF
BROADCASTERS

A handwritten signature in black ink that reads "Henry L. Baumann". The signature is written in a cursive, slightly slanted style. The first name "Henry" is written in a larger, more prominent script, followed by "L." and "Baumann". The signature is positioned above a horizontal line.

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September 5, 2001

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ATTACHMENT A

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V.

Civil Action No. 00-1571-A

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PRELIMINARY STATEMENT

The Satellite Home Viewer Improvement Act of 1999 (SHVIA) created a statutory copyright license which permits satellite carriers, such as plaintiffs Directv and Echostar to retransmit local television broadcasts without the need to identify and obtain authorization from copyright owners. SHVIA was enacted in response to complaints by plaintiffs to Congress that a disparity in the copyright licensing scheme applicable to satellite and cable operators placed satellite carriers at a competitive disadvantage.

Congress responded by enacting legislation which was intended to promote competition by eliminating any disparity in regulatory treatment, thereby neutralizing the federal government's influence on the respective competitors. SHVIA accomplishes that objective, on a market by market basis, by seeking to achieve parity not only in the copyright licensing schemes governing carriage of local broadcasts, but also in the respective obligations of cable and satellite operators to carry the signals of local broadcast stations. Thus, the copyright license created by SHVIA may be used only in those areas where satellite carriers adhere to carriage obligations that track those of the cable industry - - in essence, market areas where all full-power broadcast stations are carried with exceptions similar to those applicable to cable companies.

In addition to promoting fair, even-handed competition, the statute's carriage obligation also assures that the newly created copyright licensing scheme does not create any collateral adverse effects on local broadcasters. If the new copyright license could be used to carry only a subset of local stations in a given market area, those local broadcast stations that are not carried would be placed at a significant competitive disadvantage relative to those stations that are carried. Thus, the new regulatory scheme that plaintiffs ask this Court to create would accomplish nothing more than eliminating a competitive disadvantage for satellite carriers by creating a new competitive disadvantage for a segment of the broadcast industry. Congress rejected that "solution" to the problem, and there is no basis for this Court to upset that judgment.

As a result of the statute, plaintiffs have entered into a period of explosive growth in their customer base, and expect to reap billions of dollars in profits. Evidently dissatisfied with the scope and magnitude of Congress's largesse, plaintiffs now come before this Court and ask to retain all of the benefits conferred

by the statute, and to be relieved of the only significant limitation provided for in the statute, *i.e.*, that they use the copyright license only in areas where they are carrying all local broadcast channels in a market.

As explained below, Congress's decision is well within its authority under both the Copyright and Commerce Clauses. Moreover, SHVIA does not impose any burden sufficient to implicate the First Amendment and, even if it did, it is fully in accord with applicable First Amendment standards. Finally, plaintiffs' claims under the Takings and Due Process Clauses of the Fifth Amendment are without merit.

STATUTORY AND REGULATORY BACKGROUND

A. Requirements Governing Retransmission Of Local Broadcast Television Programming By Cable Systems

For most of the period since 1962, cable television operators have been required by federal regulation, and subsequently by federal statute, to carry local television broadcast signals upon the request of an eligible television broadcast station located in an area served by the cable system.¹ The "must-carry" obligation of cable operators was ultimately codified by Congress in sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. §§ 534 and 535), and upheld by the Supreme Court in Turner Broadcasting System v. Federal Communications Commission, 520 U.S. 180 (1997) ("Turner II").

As part of the general revision of the copyright laws in 1976, Congress amended the Copyright Act to grant owner(s) of a copyright in an audiovisual work, such as a television program, the exclusive right to perform or display the copyrighted work publicly, or to authorize a public display or performance of the work. 17 U.S.C. §§ 106(4) and (5). Section 106 of the Copyright Act thus generally requires a party seeking to retransmit broadcast television programming to obtain authorization from each owner of a copyright in the various television programs included in the broadcast.

¹ See generally United States v. Southwestern Cable Company, 392 U.S. 157, 165-166 (1968); Quincy Cable TV v. Federal Communications Commission, 768 F.2d 1434, 1438-1443 (D.C. Cir. 1985), cert. denied by National Association of Broadcasters v. Quincy Cable TV, 476 U.S. 1169 (1986); Turner Broadcasting System v. Federal Communications Commission, 512 U.S. 622 (1994) ("Turner I").

At the same time, section 111(c) of the 1976 Act created a compulsory copyright licensing scheme that permits cable systems to retransmit television broadcast signals where carriage of the signals is permissible under the rules and regulations of the Federal Communications Commission. 17 U.S.C. § 111(c). Congress established the compulsory copyright license because it concluded that "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." H. R. Rep. No. 94-1476, at 89 (1976).

B. Requirements Governing Retransmission Of Local Broadcast Television Programming By Satellite Carriers

1. Prior law

In 1988, Congress enacted the Satellite Home Viewer Act (SHVA), Pub. L. No. 100-667, § 202(2), 102 Stat. 3949 (1988). SHVA created a new statutory copyright license that permitted satellite carriers to retransmit the signals of network broadcast stations to an "unserved household," which was defined by the statute as a household that cannot receive an over-the air signal of the network through a conventional outdoor rooftop antenna. 17 U.S.C. § 119(a)(2) and (d)(10). Thus, in contrast to the compulsory license created for cable operators by section 111, because the statutory license created by SHVA was limited to "unserved households," it could not, in most circumstances, be utilized to retransmit the signal of a local television broadcast station into that station's local market.

2. Legislative proceedings leading to the enactment of SHVIA

On February 6, 1997, Senator Hatch asked the Copyright Office to conduct a review of the Copyright Act's compulsory licensing provisions governing the retransmission of broadcast television signals. See S. Rep. No. 106-42, at 6 (1999) at 6. Defendants' Joint Exhibits ("D. Ex.") 105. The Copyright Office conducted hearings in May 1997, and issued a final report on August 1, 1997. Id. Following the issuance of the report, Congress held hearings on the copyright licensing provisions over a two year period.

In these hearings, representatives of the satellite industry contended that the disparity between the licensing schemes governing retransmission of television broadcast signals by cable operators and satellite carriers, respectively, created an unfair competitive advantage for cable operators.² Cable industry representatives contended that "there would be no parity of treatment under either the copyright or the communications laws" unless cable operators' statutory copyright license is viewed in conjunction with the statutory "must-carry" obligations of cable operators.³ Similar concerns were expressed by Senators Leahy and Kohl. Senate Hearing (1997) (D. Ex. 101) at 12 (Statement of Sen. Leahy) ("I am trying to figure out . . . how [cable providers, satellite carriers, and others] can effectively compete head-to-head with similar must-carry and network non-duplication rules."); *id.* at 32 (Statement of Sen. Kohl) (Satellite providers should have "obligations roughly analogous to those imposed on cable television."). Finally, the broadcast industry expressed concern that selective retransmission of television broadcasts by satellite carriers would

² *Copyright Licensing Regimes Governing Retransmission of Broadcast Signals: Hearing Before the House Subcommittee on Courts and Intellectual Property*, 105th Cong. 42 (1997) ("House Hearing (1997)") (D. Ex. 102) (Statement of Steven J. Cox, Senior Vice President, DIRECTV, Inc.) ("[T]he satellite license needs to be revised so as to place DBS providers on a more equal footing with their cable competitors, who currently drive [sic] competitive advantages from the terms of the cable compulsory license."); *id.* at 61-62 (Statement of Charles C. Hewitt, President of Satellite Broadcasting and Communications Association of America (SBCA)) (SHVA should be revised to permit "local-into-local" transmissions of broadcast television stations to enable "satellite providers and others to have the same market access rights as the competition."); *Copyright Licensing Regimes Governing Retransmission of Broadcast Signals (Part II): Hearing Before the House Subcommittee on Courts and Intellectual Property*, 105th Cong. 6 (1998) ("House Hearing (1998)") (D. Ex. 100) (Statement of Charles W. Ergen, President and CEO, Echostar Communications Corp.) (Congress should enact a compulsory copyright license that permits retransmission of local signals "to the same full extent that cable operators have that right today. Consumer surveys and Echostar's own experience as a company, show that the single greatest barrier to choosing DBS is the lack of local programming."); *see also The Copyright Office Report on Compulsory Licensing of Broadcast Signals: Hearing Before the Senate Committee on the Judiciary*, 105th Cong. 32 (1997) ("Senate Hearing (1997)") (D. Ex. 101) (Statement of Charles C. Hewitt, President of SBCA) ("[W]e need the same rights to provide local signals back to their own markets as cable and other providers do."); *id.* at 36 ("It is important that the satellite license be reformed so that there is competitive neutrality between the satellite and cable licensing regimes.").

³ House Hearing (1997) (D. Ex. 102) at 82 (Statement of Decker Anstrom, President and CEO, National Cable Television Association); *see also* Senate Hearing (1997) (D. Ex. 101) at 50 (Statement of Decker Anstrom, President and CEO, National Cable Television Association).

undermine the objectives of the cable must-carry rules.⁴

3. The Satellite Home Viewer Improvement Act

Through the Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A-521 (1999) (SHVIA), Congress sought to accommodate each of these competing considerations.

As the Conference Committee's Report explains:

In passing this legislation, the Conference Committee was guided by several principles. First, the Conference Committee believes that promotion of competition in the marketplace for delivery of multichannel video programming is an effective policy to reduce costs to consumers. To that end, it is important that the satellite industry be afforded a statutory scheme for licensing television broadcast programming similar to that of the cable industry. At the same time, the practical differences between the two industries must be recognized and accounted for.

Second, the Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism. * * * To that end, the Committee has structured the copyright licensing regime for satellite to encourage and promote retransmissions by satellite of local television broadcast stations to subscribers who reside in the local markets of those stations.

Third, perhaps most importantly, the Conference Committee is aware that in creating compulsory licenses, it is acting in derogation of the exclusive property rights granted by the Copyright Act to copyright holders, and that it therefore needs to act as narrowly as possible to minimize the effects of the government's intrusion on the broader market in which the affected property rights and industries operate.

H. R. Conf. Rep. No. 104-464 (D. Ex. 103) at 92 (1999).

Consistent with these principles, section 1002 of SHVIA adds a new section 122 to the Copyright Act which limits the exclusive rights of copyright owners in television broadcast programs by creating a statutory license. That license, like the statutory license created for cable operators, authorizes secondary

⁴ House Hearing (1997) (D. Ex. 102) at 154 (Statement of Wade H. Hargrove, Counsel, Network Affiliated Stations Alliance) (A compulsory copyright license permitting satellite carriers to pick winners and losers in each market "would be a giant step backward in the progress that the Congress has made in trying to preserve local free over-the-air service."); House Hearing (1998) (D. Ex. 100) at 59 (Statement of James J. Popham, Vice President and General Counsel, Association of Local Television Stations) ("[H]aving been rescued by the cable must-carry rules and having struggled to establish a beachhead in their assault on the three entrenched networks' dominance, these independents and emerging network affiliates again find the sand eroding beneath them as they are placed by EchoStar at a distinct competitive disadvantage in their local markets."); *id.* at 83 (Carriage requirements "are critical to ensure that local-to-local enhances rather than undermines local over the air broadcasting.").

transmissions of television broadcasts by satellite carriers in a broadcast television station's local market without the need for securing the authorization of individual copyright owners. 17 U.S.C. § 122(a). As in the case of cable operators, satellite carriers that re-transmit local broadcasts pursuant to section 122 incur no royalty obligations to copyright owners. Id., § 122(c).

The licensing scheme created by SHVIA also includes carriage provisions that parallel those applicable to the cable industry. In order to qualify for the statutory license created by section 122, a satellite carrier must comply with "the rules, regulations, or authorizations of the Federal Communications Commission governing the carriage of television broadcast station signals." 17 U.S.C. § 122(a)(2). Section 1008(a) of SHVIA, in turn, amends Title III of the Communications Act of 1934 to add a new section 338 (codified at 47 U.S.C. § 338). Section 338 sets out requirements governing the carriage of television broadcast station signals by satellite carriers that choose to provide secondary transmissions of television broadcasts within a local market pursuant to the statutory licensing scheme created by 17 U.S.C. § 122. Subject to certain limitations, section 338(a), like the "must-carry" provisions applicable to cable operators (47 U.S.C. §§ 534 and 535), requires satellite carriers who provide secondary transmissions of television broadcasts under section 122 within a particular local market to "carry upon request the signals of all television broadcast stations within that local market." 47 U.S.C. § 338(a)(1).⁵

However, SHVIA also contains a key limitation which "recognize[s] and account[s] for" the "practical differences between the two industries." H. R. Conf. Rep. No. 104-464 (D. Ex. 103) at 92 (1999). Specifically, SHVIA's carriage obligations, unlike the corresponding "must-carry" requirement

⁵ Like the corresponding provisions governing cable operators (see 47 U.S.C. § 534(a)(5)), SHVIA's carriage provisions do not apply where the signal of one local commercial broadcast television station duplicates the signal of another. Id., § 338 (c)(1). Satellite carriers also have no obligation to carry more than one local commercial broadcast station in a single market that is affiliated with a particular network. Id. In addition, SHVIA authorizes the F.C.C. to limit the obligations of satellite carriers, under the terms of the statutory copyright license, to carry local non-commercial broadcast stations. Id., § 338(c)(2). As in the case of the cable must-carry provisions (see 47 U.S.C. § 534(b)(10)(B)), the statute requires broadcast stations asserting a right to carriage under section 338(a) to bear the costs of delivering a good quality signal to a designated local receive facility of the satellite carrier. Id., § 338(b).

applicable to cable systems, apply only "on a market-by-market basis," id. at 100, in circumstances where a satellite carrier provides secondary transmissions within a given local market "under section 122 of title 17" which is the statutory copyright license. 47 U.S.C. § 338(a). Thus, in contrast to the cable must-carry requirements, SHVIA allows satellite carriers to choose whether to incur a carriage obligation in a particular market in exchange for the benefits of the statutory license.⁶

Through SHVIA, Congress sought to "create parity and enhanced competition between the satellite and cable industries in the provision of local television broadcast stations." H.R. Conf. Rep. No. 104-464 (D. Ex. 103) at 93-94. Congress also sought to ensure that the copyright license created by SHVIA cannot be used in a manner which would adversely affect over-the-air broadcasters and their viewers. Id. at 101. Specifically, Congress was concerned that, in the absence of a carriage obligation, "satellite carriers would carry the major network affiliates and few other signals [and] [n]on-carried stations would face the same loss of viewership Congress previously found with respect to cable non-carriage." Id. at 101. The carriage obligation was intended to ensure that DBS providers do not cherry pick stations, and thereby "effectively prevent many other local broadcasters from reaching potential viewers in their service areas." Id.

ARGUMENT

I. SHVIA IS WELL WITHIN THE SCOPE OF CONGRESS' POWERS UNDER ARTICLE I OF THE CONSTITUTION

A. Congress Has Broad Authority Under the Copyright Clause To Define The Scope of Exclusive Rights of Owners Of Copyright Interests In Television Broadcasts

Congress has broad constitutional authority to define the scope of exclusive rights to be conferred by copyright:

⁶ In recognition of the fact that satellite programming is distributed on a national basis, SHVIA does not impose the channel-positioning restrictions imposed on cable operators (see 47 U.S.C. § 534(b)(6)). Instead, SHVIA provides that satellite carriers are not required to provide local television broadcast signals on any particular channel number or in any particular order, except that the carrier must retransmit the signals of all stations within a local market on contiguous channels and provide access at a non-discriminatory price and in a non-discriminatory manner. Id., § 338(d).